Supreme Court, U.S.
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No. 05-1586

In The Supreme Court of the United States

DENNIS A. REID,

Petitioner,

v.

ALENIA SPAZIO, S.p.A. and FINMECCANICA, S.p.A.,

Respondents.

On Petition For A Writ Of Certiorari To The Fourteenth Court Of Appeals Of Texas

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

While Petitioner attempts to raise three questions for this Court, none provide a basis for a grant of certiorari to the Texas court of appeals. Petitioner's first question presented – relating to the attribution of alleged co-conspirators' contacts with the forum state – focuses on an issue that he failed to raise in exhaustive state court proceedings. Thus, putting aside the merits of this question, it is not properly before this Court. Petitioner's second question presented – relating to the collective evaluation of contacts – is neither implicated by the opinion below, nor indicative of any split of authority among lower courts. Petitioner's third question presented – relating to third-party directed contacts with the forum state – is similarly based on a misreading of the opinion below and on inapposite case law.

LIST OF PARTIES

Petitioner Dennis A. Reid ("Petitioner" or "Reid"), a Canadian citizen, claims that he derivatively represents two Delaware companies in this action: U.S. Russian Telecommunications, LLC ("USRT") and its parent, USRT Holdings, LLC ("USRT Holdings"). Respondents are Alenia Spazio, S.p.A. ("Alenia") and Finmeccanica, S.p.A. ("Finmeccanica"), both Italian companies (collectively, the "Italian companies").[1]

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

ALS S.p.A., formerly Alenia Spazio, S.p.A., is a wholly-owned subsidiary of SO.GE.PA., S.p.A., which in turn is a wholly-owned subsidiary of Finmeccanica, S.p.A., a publicly-traded company listed on the Milan Stock Exchange. The Italian Ministry of Economy and Finance owns 33.8% of Finmeccanica's shares. No publicly held company owns more than 10% of Finmeccanica's shares.

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[1] For the purposes of this Brief in Opposition, Respondents accept Petitioner's statements of the "Opinions Below," "Jurisdiction," and "Constitutional Provisions Involved."

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
COUNTER-STATEMENT OF THE CASE	1
I. Procedural History	1
II. The Decision of The Court of Appeals Was Correct and Consistent with Established Law	2
A. Alenia's Alleged Contacts Do Not Support Specific Jurisdiction	3
1. USRT Held Itself Out As A Georgia-based Company In Joint Venture Negotiations with Alenia	3
2. USRT Members Sold Their Interests to USRT Holdings Without Notifying Alenia	5
B. Alenia's Alleged Contacts Do Not Support General Jurisdiction	7
REASONS FOR DENYING THE PETITION	8
I. Petitioner's Claims Concerning The Conspiracy Theory of Jurisdiction Do Not Provide an Appropriate Basis To Grant Certiorari	9
A. Petitioner Failed to Properly Present a Federal Question on This Matter in The Texas State Courts as Required by Section 1257(a)	10

TABLE OF CONTENTS – Continued

Page

B. No Federal Question Concerning Conspiracy-Related Contacts Is Presented by This Case 13

II. There Is No Division Among Courts Concerning The Purported "Collective" and "In Isolation" Approaches To Minimum Contacts 16

III. Petitioner Does Not Identify, and This Case Does Not Implicate, a Split Regarding "Third-Party Directed" Contacts 19

IV. The Court of Appeals' Fair Play Analysis Is an Independent and Alternative Grounds for That Court's Ruling 21

A. Any Exercise of Jurisdiction Under The Texas Long Arm Statute Must Comport With Traditional Notions of Fair Play and Substantial Justice 21

B. The Factual Findings of The Court of Appeals, as well as The Record in This Case, Make Clear That Jurisdiction Over Alenia in Texas Would Offend Fair Play and Substantial Justice 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 11

Alenia Spazio, S.p.A. v. Reid, 130 S.W.3d 201 (Tex. App. – Houston [14th Dist.] 2003, pet. denied).....*passim*

Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102 (1987) 23, 24, 25

BMC Software Belgium v. Marchand, 83 S.W.3d 789 (Tex. 2002) 22

Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120 (2d Cir. 2002) 21

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 10

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 23, 24

Calder v. Jones, 465 U.S. 783 (1984) 15

Chaiken v. VV Publishing Corp., 119 F.3d 1018 (2d Cir. 1997), *cert. denied*, 522 U.S. 1149 (1998) 22

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 13

Denmark v. Tzimas, 871 F. Supp. 261 (E.D. La. 1994) 23

General Elec. Company v. Brown & Ross Int'l Distribs., Inc., 804 S.W.2d 527 (Tex. App. – Houston [1st Dist.] 1990, writ denied) 12

Guardian Royal Exchange Assurance, Ltd. v. English China Clays, P.L.C., 815 S.W.2d 223 (Tex. 1991) 24

TABLE OF AUTHORITIES – Continued

Page

Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 408 (1984) 17

Herb v. Pitcairn, 324 U.S. 117 (1945) 9

Madison Consulting Group v. State of South Carolina, 752 F.2d 1193 (7th Cir. 1985) 20

Magnolia Gas Co. v. Knight Equip. & Mfg. Corp., 994 S.W.2d 684 (Tex. App. – San Antonio 1998, no pet.) 17, 18

Mesalic v. Fiberfloat Corp., 897 F.2d 696 (3d Cir. 1990) 20

Mid-America Tablewares v. Mogi Trading Co., 100 F.3d 1353 (7th Cir. 1996) 16

Myers v. John Deere, Ltd., 683 F.2d 270 (8th Cir. 1982) 21

Nat'l Ind. Sand Ass'n v. Gibson, 897 S.W.2d 769 (Tex. 1995) ..... *passim*

Northrup King Co. v. Compañía Productora Semillas Algodoneras Selectas S.A., 51 F.3d 1383 (8th Cir. 1995) 16

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 12

Schlobohm v. Schapiro, 784 S.W.2d 355 (Tex. 1990) 22

Shell Compañia Arg. de Petroleo, S.A. v. Reef Exploration, Inc., 84 S.W.3d 830 (Tex. App. – Houston [1st Dist.] 2002, pet. denied) 17

Space Mktg., Inc. v. USRT Holdings, LLC, No. H-01-4117 (S.D. Tex. Jul. 8, 2004) 1

Stauffacher v. Bennett, 969 F.2d 455 (7th Cir. 1992) 13

TABLE OF AUTHORITIES – Continued

Page

Tacon v. Arizona, 410 U.S. 351 (1973) 10

Televentures, Inc. v. Int'l Game Tech., 12 S.W.3d 900 (Tex. App. – Austin 2000, pet. denied) 17, 18

Trinity Indus., Inc. v. Myers & Assocs., Ltd., 41 F.3d 229 (5th Cir.), *cert. denied*, 516 U.S. 807 (1995) 20

Webb v. Webb, 451 U.S. 493 (1981) 10, 11

Wilson v. Belin, 20 F.3d 644 (5th Cir.), *cert. denied*, 513 U.S. 930 (1994) 22

STATUTES AND RULES

27 U.S.C. § 1257(a) 10

SUP. CT. R. 10 10

SUP. CT. R. 10(a) 18

SUP. CT. R. 14(g)(i) 11

COUNTER-STATEMENT OF THE CASE

I. Procedural History

On March 11, 2002, Petitioner, a Canadian citizen, filed suit against the Italian companies, Admiral Giorgio Capra ("Admiral Capra"), an Italian citizen residing in Italy, and Davide Siniscalchi ("Siniscalchi"), an Illinois resident, in Texas district court, Harris County, alleging six substantive causes of action, all of which involve an alleged joint venture agreement between USRT and Alenia. CR 9-12. Petitioner sues in a purported derivative capacity on behalf of USRT, LLC, a Delaware company that, after October 1998, was wholly owned by USRT Holdings, LLC, also a Delaware company.[2]

Alenia challenged personal jurisdiction by special appearance, which was denied by the Harris County trial court. The Texas Fourteenth Court of Appeals reversed, finding, in relevant part, that: (1) "[Alenia's] very limited contacts with Texas relating to the subject matter of this lawsuit are insufficient to support the exercise of specific jurisdiction"; (2) "a Texas court may not exercise personal jurisdiction over [Alenia] under a general-jurisdiction theory"; and (3) the exercise of personal jurisdiction would "offend traditional notions of fair play and substantial justice." Pet. App. 7, 17, 24, 28. Petitioner's Motion for Rehearing and Rehearing En Banc to the court of appeals was denied. Pet. App. 34-35.

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[2] Other members of USRT, including Dr. Valery Aksamentov and Jon Reed, chose to bring their own suit, based on the same facts but on a different legal theory, in federal court in Texas. The federal district court for the Southern District of Texas dismissed all of their claims against Alenia for lack of personal jurisdiction. *See Space Mktg., Inc. v. USRT Holdings, LLC*, No. H-01-4117 at *24-31 (S.D. Tex. Jul. 8, 2004).

Petitioner then sought review by the Supreme Court of Texas, which requested full merits briefing on the personal jurisdiction issues. The Supreme Court of Texas denied review, and Petitioner sought rehearing, which was also denied. Pet. App. 36-37.

II. The Decision of The Court of Appeals Was Correct and Consistent with Established Law

This lawsuit arises out of an alleged joint venture between Respondents Alenia and Finmeccanica, Italian corporations with their headquarters in Rome, Italy, and USRT, a Delaware corporation with offices in Georgia. The joint venture was negotiated in *Europe* and called for USRT to obtain rights from a *Russian* entity, under the authority of the *Russian* government, to certain specified orbital slots to be used for communications satellites over *Russia*; for Alenia, an *Italian* company, to manufacture the satellites in manufacturing facilities in *Italy*; for the *Italian* government to finance the project with *Italian* tax revenues; and for a *Russian* company to launch the satellites from ground stations located in *Russia* and to monitor these satellites in fixed orbits over *Russia*. SSCR 32-61. Rather than presenting an opportunity to address divergent precedents on issues of jurisdiction, the court of appeals' decision correctly applied well-settled legal principles to the unique facts of this case.

A. Alenia's Alleged Contacts Do Not Support Specific Jurisdiction

1. USRT Held Itself Out As A Georgia-based Company In Joint Venture Negotiations with Alenia

USRT was allegedly founded in 1997 by a Russian-born scientist to pursue a potential business opportunity to replace aging and obsolete satellites in Russian orbital slots, allocate some of the satellite capacity to the Russian government, and market the remaining capacity to private entities. CR 4-5. The Italian Government expressed an interest in the project, and appointed Admiral Capra, an officer of the Italian Navy and a member of the Board of Directors of the Italian Space Agency, and Siniscalchi, to explore financing for the project.

In late December 1997, Admiral Capra contacted Alenia and arranged for a meeting at his office in Rome between representatives of Alenia and the then president of USRT. CR 6, SSCR 178. Following this initial contact, on January 12, 1998, representatives of USRT and Alenia met in Rome to discuss cooperation on the potential satellites project. SSCR 180. At this meeting, USRT and Alenia negotiated and entered into the first of a series of non-binding memoranda of agreement ("MOAs") that roughly outlined potential areas of responsibility for the project. *Id.* 39-42.

On January 27, 1998, Alenia and USRT entered into a second MOA, which expressly superseded the January 12 MOA. SSCR 32-37. This MOA was negotiated in part during a meeting held by USRT representatives in Houston and attended by two Alenia employees, who spent a total of twenty-four hours in the State of Texas. *Id.* 27,

181.[3] Following the negotiations, the January 27 MOA was signed by Alenia in Rome. *Id.* 28.

On May 12, 1998, USRT and Alenia entered into and signed a new MOA in Moscow, which expressly superseded the January 12 and January 27 MOAs and declared them "null and void." SSCR 51-55.[4] The responsibilities of the parties that were set forth in the May 12 MOA were expressly conditioned on a grant of financing for the project from the government of Italy. *Id.* 53. Unlike the prior MOAs, the May 12 MOA explicitly provided for arbitration for "any dispute between the parties arising in connection with this MOA" in *London*, in accordance with "the laws of the United Kingdom." *Id.* 53-54. The May 12 MOA also stated that it could be "terminated by either party through 30 days written advance notice." *Id.* 53.

On May 15, 1998, USRT, Alenia, and InSpace JSC ("InSpace"), a Russian company, entered into an additional, three-way MOA related to the projects and orbital slots contemplated by the May 12 MOA. SSCR 57-61. The May 15 MOA, which was negotiated and signed in Moscow, expressly superseded a prior April 8 MOA between the same three parties concerning the same underlying project. *Id.* 59, 184. In addition, the May 15 MOA stated

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[3] Since USRT maintained no office space in Texas, the meeting took place in a conference room at the University of Houston; USRT representatives conceded that "USRT's principal place of business was listed in contracts as being in Georgia * * * because that is where we had office space." SSCR 69.

[4] Significantly, the May 12 MOA concerned different orbital slots than those covered by the January MOAs, which had been awarded to the French companies Alcatel and Aerospatiale. *Id.* 50, 190-91.

that it would expressly terminate sixty days from the date of the signature. *Id.* 61.

Each of the successive MOAs reflects that USRT was a company organized under the laws of Delaware, with its offices in Roswell, Georgia. Pet. App. 11. None of the MOAs mentioned any USRT relationship with the State of Texas. Moreover, none of the MOAs contemplated any future performance by any party in the State of Texas. In fact, the only MOA with any relation at all to Texas – the January 27 MOA that was partly negotiated during a one-day meeting in Houston – was expressly superseded by the May 12 MOA, which was signed in Moscow, and contained the dispute settlement provision that called for arbitration in London under the laws of the United Kingdom.[5]

2. USRT Members Sold Their Interests to USRT Holdings Without Notifying Alenia

According to Petitioner's allegations, in the fall of 1998, Admiral Capra and Siniscalchi told USRT that it had to be entirely owned by Italian citizens before the Italian government would provide any financing. CR 7. Petitioner claims, therefore, that in October 1998, former members of USRT then sold their membership interests in USRT to USRT Holdings, a company wholly owned by

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[5] In connection with the efforts to secure financing for the project from the Italian government, USRT also provided Alenia with a document titled "A Brief History of USRT." SSCR 179. That document explicitly provided that "operations of USRT are directed from USRT's offices in Atlanta, Georgia," and showed that only three of USRT's ten members – with a collective ownership interest of 25.35% – were Texas residents. *Id.* 280-81, 285. The profile also indicated that USRT had no employees and that the working capital for USRT was principally provided by Georgia-based Space Marketing, Inc. *Id.* 282, 285.

Admiral Capra, for a portion of future profits to be earned from the satellites project. *Id.* 7-8. Alenia was not aware of this change in the ownership structure of USRT until October 1999, when Reid sent a letter to Alenia to notify it of the transfer. SSCR 186-87.

Reid nonetheless based his tort theory on the allegation that in May 1999, five months *prior* to that sale, Admiral Capra, Siniscalchi, and Alenia developed a plan to divest USRT of its rights to future profits in the alleged joint venture. CR 8; SSCR 123-24.[6] The sole support for the allegation of this conspiracy is Petitioner Reid's own affidavit, which relies on a triple hearsay account of what Siniscalchi supposedly told him had transpired at the May 1999 meeting in Rome that allegedly regarded the satellites project. SSCR 123-24. Siniscalchi himself did not attend this meeting. *Id.* Giuseppe Viriglio, Vice Chairman and Managing Director of Alenia during the relevant period, who *did* attend the meeting, expressly rejected Petitioner's account in deposition testimony. Pet. App. 9 n.6.

When Alenia ultimately learned from Reid of the suspect transfer of USRT's rights to USRT Holdings in October 1999,[7] by letter dated December 20, 1999, Alenia

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[6] Reid claims that on May 25, 1999, Siniscalchi called him to say that a May 19, 1999 meeting allegedly regarding the satellites project had taken place in Rome between Michael Topolev of InSpace, Viriglio of Alenia, and Admiral Capra, and that Alenia had proposed to issue a lump sum payment and provide consulting contracts to Admiral Capra, Siniscalchi, Reid, and Reed – collectively, the entire ownership and management structure of USRT at the time – in exchange for the transfer of USRT's satellite rights to Alenia. CR 8; SSCR 123-24.

[7] We note that while the Petition alleges that in late 1999, the Italian Companies began implementation of the satellites project without USRT, CR 8, the sole basis for this claim is a press release describing an unrelated project, involving "Yamal" satellites, undertaken by

(Continued on following page)

terminated the May 12, 1998 MOA with USRT consistent with the terms of that agreement. SSCR 171, 186.

B. Alenia's Alleged Contacts Do Not Support General Jurisdiction

Respondents are Italian corporations. They are not currently nor have they ever been qualified, authorized, or licensed to conduct or transact business in Texas. They do not maintain any inventory in the State of Texas; do not have any sales representatives, distributors, brokers or wholesalers within Texas; do not have any bank accounts in the State of Texas; do not have any telephone listings in a public telephone directory in Texas; have not paid taxes or franchise fees in Texas; do not regularly advertise in Texas; and have no authorized agent to accept service of process in Texas. Pet. App. 18-25.

The only "general" contacts that Reid has identified to support general jurisdiction over the Italian companies result from Alenia's work as a subcontractor to various European entities and came at the exclusive direction of those entities pursuant to Alenia's contractual obligations. Alenia had contracts with the Italian Space Agency ("ASI"), as well as with two German companies that, in turn, had contracts with the European Space Agency ("ESA"). SSCR 196-201. ASI and ESA, in turn, had prime contracts with the National Aeronautics and Space Administration ("NASA"), a United States federal agency.

Alenia with Gascom, a completely distinct Russian entity. Pet. 5; SSCR 276. The press release cited by Reid in support of this 1999 project, however, is dated March 15, 2001. Though the Italian companies pointed out this fact in prior briefing to the Texas courts, Reid has not sought to explain these inconsistencies.

Alenia's subcontracts concern the design, manufacture, maintenance, and supply of hardware for the International Space Station. All design and manufacturing work for this hardware is performed at Alenia's manufacturing facilities, which are located exclusively in Italy.

Petitioner does not allege, nor could he, that Alenia's contracts with ASI and ESA required contact with Texas. While the contracts necessarily contemplated testing and support responsibilities relating to the hardware, the locus of those activities was entirely determined by NASA and Alenia in no way participated in that decision: "NASA, rather than the Italian Companies, decided that some of Alenia's services under the contracts with three European entities would be performed at the Space Center." Pet. App. 22. Alenia did not know in advance whether NASA would allocate responsibility for the International Space Station to Johnson Space Center in Texas or to another NASA center in a different state, as NASA had previously done. SSCR 198-99.

REASONS FOR DENYING THE PETITION

None of Petitioner's claimed bases for certiorari supports review by this Court. Reid's leading argument, Pet. 12-18, which suggests that the court of appeals improperly "ignored" conspiracy-related contacts, is not properly before this Court because: (1) Petitioner failed to raise a federal question on this point at any time during the extensive state court proceedings in this case; and (2) the record in this case does not support the existence of a conspiracy or any conspiracy-related contacts that would alter the outcome of the jurisdiction inquiry.

Petitioner's other arguments in support of certiorari rely on misreadings of case law and the opinion below, and are equally without merit. Reid's assertion that the court of appeals improperly examined Alenia's contacts with Texas in "isolation" elevates form over substance and proposes review of a "split" that falls short of this Court's Rule 10 requirements. Pet. 18-24. Similarly, Petitioner's argument that the court of appeals unwisely followed the "minority approach" to evaluate third-party directed contacts rests on his comparison of wholly inapposite cases and his distortion of the opinion below. Pet. 24-29.

Furthermore, and without regard to Petitioner's arguments for certiorari, this Court should deny the petition because the court of appeals judgment rests independently on its unchallenged finding that the exercise of jurisdiction over the Italian Companies would offend the "fair play and substantial justice" requirement of due process. Pet. App. 29. Review of the questions presented by Petitioner would thus amount to a mere advisory opinion in this case. *See Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (explaining that the Supreme Court is "not permitted to render an advisory opinion.").

I. Petitioner's Claims Concerning The Conspiracy Theory of Jurisdiction Do Not Provide an Appropriate Basis To Grant Certiorari

Petitioner asserts that certiorari should be granted in this case to resolve a split of authority concerning how a defendant's alleged conspiracy-related contacts may be considered in the specific jurisdiction inquiry. As Petitioner would have it, review is necessary here because the Texas Supreme Court's holding in *National Industrial Sand Ass'n v. Gibson*, 897 S.W.2d 769 (Tex. 1995) (orig.

proceeding), diverges from the so-called "imputation" and "actual participation" approaches to conspiracy-related contacts that are used by other American courts. It is significant that Petitioner relies on the *Gibson* decision as his *sole basis* for the "minority approach" in *both* of these splits of authority.[8]

A. Petitioner Failed to Properly Present a Federal Question on This Matter in The Texas State Courts as Required by Section 1257(a)

Petitioner's argument for certiorari is fatally flawed because a federal question on this issue was not properly presented in the Texas state courts, as is required by 27 U.S.C. § 1257(a). *See Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) ("It is well settled that this Court will not review a final judgment of a state court 'unless the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.'") (*quoting Webb v. Webb*, 451 U.S. 493, 496-97 (1981)); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) (federal issues may not be raised for the first time on a petition for certiorari).

The requirements of Section 1257(a) are grounded upon important principles of (1) comity between state and

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[8] Petitioner relies on *Gibson* exclusively for one side of his "actual participation" split, and supplements *Gibson* with only two intermediate state court decisions from Washington (1995) and California (1978) for the purported "imputation" split. Pet. 14-15. Pursuant to this Court's Rule 10, the intermediate state court decisions that Petitioner cites as joining the minority approach to the purported "imputation" debate would not suffice to present a split worthy of this Court's certiorari in the absence of *Gibson*. SUP. CT. R. 10.

federal courts; (2) judicial efficiency; (3) deference to the presence of "independent and adequate state grounds that would pretermit the federal issue"; and (4) the need to develop a robust record. *Webb*, 451 U.S. at 500-01. Considerations of comity properly function to allow state courts "an opportunity to consider * * * proposed changes [to state law] that could obviate any challenges to state action in federal court." *Adams v. Robertson*, 520 U.S. 83, 90 (1997). In other words, where possible, state courts should be given a chance to review their decisions before they are challenged as unconstitutional in this Court.

Despite the unequivocal requirements of Section 1257(a), Petitioner has not demonstrated, because he cannot, that he raised a federal question on this point in the Texas court of appeals, or Texas Supreme Court, and, accordingly, cannot show that Texas courts addressed or ruled on such a federal question. Moreover, despite the requirement of Rule 14(g)(i) of this Court that a petition for certiorari must specify from the record of the state court proceedings when and how the federal question was raised in briefing below, *see* SUP. CT. R. 14(g)(i), Reid has made no effort, again because the record is devoid of any such references, to identify any prior discussion of this purported federal question in the briefing of this case.

The record in this case reveals that through three rounds of briefing to the Texas Supreme Court, conducted over a twenty-month period and including six submissions by Reid spanning 111 pages, Reid was entirely silent on the "conspiracy-related contacts" issue he embraces as a basis for review here. None of these briefs even mentions *Gibson*, the very Texas Supreme Court case that Petitioner now urges this Court to reverse, and none of the "Issues Presented" in Reid's Petition for Review or in his Brief on

the Merits to the Texas Supreme Court even remotely touches a "conspiracy-related contacts" question. Pet. S.C. Br. xi. Petitioner thus attempts here to both call *Gibson* into question and to rely on *Gibson* as the sole arguable basis for this split of authority, even though he neglected several opportunities to ask the Texas Supreme Court to revisit, reconsider, or clarify its decision in that case.

Reid similarly failed to make any argument at all concerning *Gibson* or imputation of co-conspirator contacts in the jurisdiction inquiry during extensive briefing to the court of appeals, including a Motion for Rehearing En Banc to that court.[9] Reid's only reference to a "conspiracy-related contacts" issue in that forum was a lone citation to a Texas appellate decision, *General Elec. Co. v. Brown & Ross Int'l Distribs., Inc.*, 804 S.W.2d 527 (Tex. App. – Houston [1st Dist.] 1990, writ denied), for the general proposition that a "defendant who participates in a conspiracy known to impact Texas has satisfied [the] requirements for specific jurisdiction." Pet. C.A. Br. 26. Reid's one-line reference to *General Electric* cannot be seen as raising a substantial federal question under Section 1257(a). *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980) (a federal question must be presented in the state courts with "fair precision and in due time."); *see also Webb*, 451 U.S. at 501 (the record must show that "[state] courts were apprised of the nature or

[9] Indeed, the only reference to the imputation issue in the entire briefing of this case came from Alenia, which in its appellant brief to the court of appeals cited *Gibson* in a two-sentence footnote to show that the contacts of other defendants could not be imputed to Alenia for the purposes of "minimum contacts."

substance of th[illegible]deral claim at the time and in the manner required by state law.").

Reid did not raise any federal question as to "conspiracy-related contacts" in the Texas courts, and no related federal question was addressed by the Texas courts in this case.[10] Principles of federalism safeguarded by Section 1257(a) dictate that, under such circumstances, Petitioner may not now manufacture a federal question for this Court to review.

B. No Federal Question Concerning Conspiracy-Related Contacts Is Presented by This Case

Even if Petitioner had properly presented a federal question for purposes of Section 1257(a), this case does not present the opportunity to resolve any hypothetical dispute over alleged conspiracy-related jurisdictional contacts. Petitioner asserts that a conspiracy theory of jurisdiction is "implicated" here because Alenia purportedly conspired with Italian citizen Admiral Capra and Illinois citizen Siniscalchi. Pet. 16. But Petitioner must provide more than a bare allegation of conspiracy to support this type of argument. *See Stauffacher v. Bennett*, 969 F.2d 455, 460 (7th Cir.), *cert. denied*, 506 U.S. 1034 (1992) ("The cases

[10] Nor can a federal issue be said to have been "drawn in question" or "specifically set up" for the purposes of Section 1257(a) merely through the Texas court of appeals' observation of *Gibson*'s holding in a single parenthetical of its lengthy opinion. Pet. App. 15-16. Pursuant to the requirements of Section 1257(a), the federal question must be "drawn in question in a manner *directly bearing on the merits of the action*." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975) (emphasis added).

are unanimous that a bare allegation of a conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough.").

Moreover, the Texas court of appeals explicitly rejected the existence of a conspiracy in this case, explaining that "the only evidence that might arguably relate to such a conspiracy is Reid's description of a phone call from Siniscalchi in which Siniscalchi allegedly described discussions in Rome." Pet. App. 15. That lone description was contained in Reid's own affidavit and is a triple hearsay account of what Reid claims Siniscalchi told him about a meeting that Siniscalchi did not even attend. SSCR 123-24. Thus, even operating under a broad presumption in favor of Petitioner's allegations, the court of appeals found no evidence of a conspiracy involving Alenia.[11]

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[11] Petitioner asks this Court to consider instead four "underlying facts [that] provide circumstantial evidence that these parties conspired to remove USRT from the joint venture." Pet. 16. But the "underlying facts" cited by Petitioner are either directly contradicted by the opinion below, entirely unsupported by the record, or irrelevant to any allegation of conspiracy. Petitioner refers first to what he calls the "coerced sale of USRT," Pet. 16, namely the sale of USRT to USRT Holdings, a Delaware corporation, for $300 million. The record evidence is that Alenia was never aware of any pending change in the ownership structure of USRT, and was not informed of the sale until a year after it occurred, when Reid sent a letter to Alenia indicating the change. SSCR 186-87. Petitioner next cites what he calls "Alenia's proposed bribe," which was to be presented to USRT by Jon Reed, and asserts that the court of appeals "agreed [that it] provided arguable evidence of a conspiracy." Pet. 16 (citing Pet. App. 4, 15). Far from agreeing that this represented "arguable evidence," however, the court of appeals stated plainly that "there is no evidence that Alenia ever directed Reed to do this." *Reid*, 130 S.W.3d at 215. Petitioner also refers to "the termination of those managers who would not go along." Pet. 16. That termination, the record makes clear, came nine months after the sale of USRT to Delaware-based USRT Holdings, five months after the resignation of a

(Continued on following page)

Further, even if Petitioner had properly established the existence of such a conspiracy, the alleged co-conspirator contacts that impute to Alenia would in no way alter the jurisdictional calculus. As Petitioner acknowledges, *see* Pet. 17 n.8, the only potential contact the court of appeals identified was the alleged phone call from Siniscalchi to Reid, and "the record does not indicate where Reid or Siniscalchi were located during this phone call." Pet. App. 15 n.11. The only potential contact that could be imputed, then, is one phone call that may or may not have been made to Texas.[12]

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key member of the USRT management team, and was entirely the doing of USRT Holdings, not Alenia. Finally, Petitioner cites Alenia's "subsequent launch of a satellite without USRT." Pet. 16. In fact, the only record evidence relating to any purported satellite launches was a press release describing an unrelated project undertaken by Alenia with Gascom, a completely distinct Russian entity. SSCR 276.

[12] Reid also suggests that the Texas court of appeals improperly discounted Alenia's participation in an alleged conspiracy because Texas courts, following *Gibson*, do not recognize the "actual participation" theory of jurisdiction. Pet. 16-17. We note, however, that *Gibson* merely held that "plaintiffs' bare allegations of conspiracy *lacking any evidence of conspiratorial acts in or directed to Texas*" could not provide the "basis on which to assert specific jurisdiction." 897 S.W.2d at 776 (emphasis added). *Gibson* thus plainly contemplated that a defendant's individual acts *directed toward Texas* as part of a conspiracy, if properly supported by record evidence, could be used to establish specific jurisdiction. There is no division over such a principle of law, as it represents precisely the sort of analysis that courts routinely engage in under *Calder v. Jones*. 465 U.S. 783, 789-90 (1984). In other words, if a defendant takes action designed to intentionally cause harm in a forum state, such actions may be considered in the jurisdictional inquiry under the rubric of *Calder*, whether additional conspiracy claims are present or not.

II. There Is No Division Among Courts Concerning The Purported "Collective" and "In Isolation" Approaches To Minimum Contacts

Petitioner also presents as a basis for certiorari his argument that a split of authority exists over whether courts should evaluate jurisdictional contacts "collectively" or "in isolation." Pet. 18-19. As an initial matter, and as Alenia repeatedly pointed out to the Texas courts, Alenia S.C. Br. viii & n.2, there is simply no division of authority among American courts concerning this facet of the "minimum contacts" analysis. It is well-settled law that contacts are evaluated "collectively," rather than "individually." *See, e.g., Mid-America Tablewares v. Mogi Trading Co.*, 100 F.3d 1353, 1361 (7th Cir. 1996) (noting that by discussing contacts "in isolation and suggesting that none alone establishes the requisite minimum contacts, [defendant] fails to appreciate that the minimum contacts inquiry is one that examines the totality of the circumstances."); *Northrup King Co. v. Compañía Productora Semillas Algodoneras Selectas S.A.*, 51 F.3d 1383, 1388 (8th Cir. 1995) ("In determining whether there is personal jurisdiction, the courts consider the defendant's contacts with the forum in the aggregate, not individually; they look at the totality of the circumstances."). An examination of the *Reid* opinion reveals that the Texas court of appeals properly followed this methodology and held that "[o]n this record, we conclude that the Italian Companies' very limited contacts with Texas relating to the subject matter of this lawsuit are insufficient to support the existence of specific jurisdiction." Pet. App. 17-18.[13]

[13] Though the court of appeals did analyze the alleged contacts seriatim in discrete sections of its opinion, as is the sound practice of

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Petitioner's assertion that certain Texas state courts have adopted the "isolation" approach to minimum contacts rests entirely on mischaracterizations of the cases he cites. None of these courts indicates that it is adopting an "isolation" approach or deviating at all from the settled "collective" approach. Instead, after considering the relevant contacts taken together (which is precisely what is required by the "collective approach"), they merely declined to find personal jurisdiction. *See Shell Compañia Arg. de Petroleo, S.A. v. Reef Exploration, Inc.*, 84 S.W.3d 830, 838-40 (Tex. App. – Houston [1st Dist.] 2002, pet. denied) ("Although these contacts are related to some Texas entities, they are too attenuated to constitute 'minimum contacts' * * * Such fortuitous contacts made pursuant to the closing of a transaction do not meet the minimum contacts analysis.") (internal citations omitted); *Televentures, Inc. v. Int'l Game Tech.*, 12 S.W.3d 900, 912 (Tex. App. – Austin 2000, pet. denied) ("IGT's Texas contacts were incidental and immaterial to the purpose of the contract * * * and were not instigated by IGT."); *Magnolia Gas Co. v. Knight Equip. & Mfg. Corp.*, 994 S.W.2d 684, 692 (Tex. App. – San Antonio 1998, no pet.) ("The Texas contacts were entirely incidental and immaterial to the purpose of the contract and were not instigated by Magnolia and MKP, or their assignor.").

Reid's objections take aim at the form of the opinions themselves and the fact that the cited Texas courts discussed the relevant contacts either in discrete sections of their opinions or seriatim. *See, e.g., Reef Exploration*, 84

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countless other courts, *see, e.g., Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 416-18 (1984), the underlying legal standard – the "collective" approach – used by the court was correct.

S.W.3d at 837-40 (discussing the purported contacts in discrete labeled sections of the opinion); *TeleVentures*, 12 S.W.3d at 908-12 (same); *Magnolia Gas*, 994 S.W.2d at 691-692 (discussing the contacts seriatim). Such a stylistic complaint elevates form over substance and does not signal a division of authority.

Moreover, as noted above, the "collective" approach to evaluating a defendant's contacts with a forum is the established mode of analysis. Accordingly, even if Reid is correct that the cases he cites in fact apply an "isolation" approach, those cases do not amount to a division of authority on this issue, but rather discrete instances of misapplication of settled law. This Court, however, is not the proper venue to pursue such claims of error. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law.").

Putting aside the substance of the cases Petitioner cites for this split of authority, Petitioner's argument fails independently because those cases do not satisfy this Court's Rule 10 requirements. *See* SUP. CT. R. 10. Petitioner correctly identifies five United States Courts of Appeals as falling on the "collective" side of the purported division, Pet. 18-20, yet points to only three *intermediate Texas appellate courts* as taking the so-called "isolation" position. Pet. 20-22. Pursuant to the rules of this Court, certiorari would only be appropriate here if the federal circuit decisions conflicted with at least one decision of another federal circuit court or of a state court of last resort. *See* SUP. CT. R. 10(a) (noting that a writ of certiorari is appropriate when "a United States court of appeals has entered a decision in conflict with the decision of

another United States court of appeals * * * [or] a state court of last resort * * * ").

III. Petitioner Does Not Identify, and This Case Does Not Implicate, a Split Regarding "Third-Party Directed" Contacts

Petitioner's final argument for certiorari fails because the general jurisdiction inquiry performed in this case does not implicate any unresolved federal constitutional question of due process. In his attempt to persuade the Court that this case presents an open legal issue concerning general jurisdiction, Reid asserts that the Texas court of appeals "did not deny that Alenia's contacts were continuous and systematic, but held that they should be ignored because a third party, rather than Alenia, had chosen Texas as the site for the services Alenia had agreed to perform under its service contracts." Pet. 24-25.

Petitioner's assertion, however, is contradicted by the court of appeals' conclusion that "[a]fter carefully analyzing the nature and quality of the Italian Companies' contacts with Texas, we find no continuous and systematic general business contacts with Texas." Pet. App. 25. Moreover, the court of appeals did not "ignore" any contacts, as Petitioner would have it; rather, it held that the fact that Alenia's contacts with Texas came at the direction of NASA and the European space agencies "significantly diminishe[d] the quality of these contacts and does not indicate that [Alenia] purposefully directed their business activity at Texas." Pet. App. 22.

Petitioner's claim that the court of appeals' approach to general jurisdiction "has been rejected by five circuits" and implicates a "longstanding" split of authority in fact

relies on cases that do not remotely touch on the legal issue or the set of facts considered by the court of appeals. The record in this case is that Alenia's general contacts with Texas result solely from Alenia's subcontracts with European entities – who in turn had prime contracts with NASA, a United States federal agency – concerning Alenia's supply of hardware for the International Space Station. Pet. App. 18-22. The location of these services was unilaterally determined by NASA, and there is no evidence that Alenia controlled or participated in this decision. SSCR 198-99. Alenia did not know in advance whether NASA would allocate responsibility for the International Space Station to Johnson Space Center in Texas or to another NASA center in a different state, as NASA had previously done. Pet. App. 22.

None of the relevant portions of the circuit decisions cited by Reid deals with a nonresident defendant whose general jurisdiction contacts came entirely at the direction of a third party, pursuant to contractual obligations to that party. In fact, these cases do not even address *general jurisdiction* at all. Petitioner's citations stand for the uncontroversial principle of *specific jurisdiction* law that defendants who knowingly and voluntarily engage in commercial activity in the forum may not avoid suit in the forum that arises out of that activity.[14] Petitioner's attempt

[14] In *Trinity Industries, Inc. v. Myers & Associates, Ltd.*, 41 F.3d 229, 231 (5th Cir.), *cert. denied*, 516 U.S. 807 (1995), the Fifth Circuit found specific jurisdiction to be present where the nonresident law firm defendant "voluntarily assumed and continued the obligation of representing a Texas client." Similarly, in *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696, 700-01 (3d Cir. 1990), an out-of-state manufacturer voluntarily traveled to the forum to deliver and repair a boat and therefore was found subject to specific jurisdiction in the forum. In *Madison Consulting Group v. State of South Carolina*, 752 F.2d 1193,

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to create the illusion of a split by juxtaposing these inapposite cases is unavailing.

IV. The Court of Appeals' Fair Play Analysis Is an Independent and Alternative Grounds for That Court's Ruling

A. Any Exercise of Jurisdiction Under The Texas Long Arm Statute Must Comport With Traditional Notions of Fair Play and Substantial Justice

Consistent with Texas law and well-established Supreme Court precedent, the court of appeals held, "[a]fter considering all applicable factors and interests,"

1202 (7th Cir. 1985), nonresident defendants were subject to jurisdiction in Wisconsin where they actively solicited the plaintiff consulting company's services in Wisconsin and contracted for those services with the knowledge that they would be mostly performed in that state. In *Myers v. John Deere, Ltd.*, 683 F.2d 270, 271 (8th Cir. 1982), a Canadian defendant shipped products by train through North Dakota, where the cargo collapsed and injured a customs inspector. In finding that the nonresident defendant was subject to specific jurisdiction, the court stressed that defendant's forum contacts did not arise from the "unilateral activity" of another because defendant took "affirmative acts to effect delivery" of its products to the U.S., made numerous shipments to the U.S., and "knew that such shipments would go through North Dakota." *Id.* at 272. In *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 128 (2d Cir. 2002), the Second Circuit found specific jurisdiction was properly grounded over the non-resident defendant and observed that the defendant law firm "seeks to be known in the New York legal market, makes efforts to promote and maintain a client base there, and profits substantially therefrom." The court determined, accordingly, that there was nothing "fundamentally unfair about requiring the firm to defend itself in the New York courts when a dispute arises from its representation of a New York client – a representation which developed in a market it had deliberately cultivated and which, after all, the firm voluntarily undertook." *Id.* at 128-29.

"that the exercise of personal jurisdiction by a Texas court over the Italian companies would be unreasonable and would offend traditional notions of fair play and substantial justice." Pet. App. 29. Accordingly, certiorari of the court of appeals' decision should be denied because that judgment represents an independent and alternative ground for Texas' refusal to exercise personal jurisdiction over the Italian Companies in this case.[15]

The "fair play" requirement is an independent element of the due process inquiry and an alternative grounds for a court's denial of personal jurisdiction. *See, e.g.*, *Schlobohm v. Schapiro*, 794 S.W.2d 355, 358 (Tex. 1990) ("Courts must consider the fair play analysis * * * because the case law makes clear that this analysis is separate and distinct from the minimum contacts issue."); *Chaiken v. VV Publishing Corp.*, 119 F.3d 1018, 1029 (2d Cir. 1997), *cert. denied*, 522 U.S. 1149 (1998) ("Even assuming that [defendant] had the necessary minimum contacts with [the forum state], we believe that the exercise of personal jurisdiction in this case would not comport with our traditional conception of fair play and substantial justice.") (internal quotation omitted); *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir.), *cert. denied*, 513 U.S. 930 (1994) (explaining that the "'fairness' prong of the jurisdictional

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[15] Texas courts, interpreting the Texas long-arm statute, have explained that "fair play and substantial justice" is a requirement of due process. *See, e.g.*, *BMC Software Belgium v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002) ("Personal jurisdiction over nonresident defendants is constitutional when two conditions are met: (1) [minimum contacts], and (2) the exercise of jurisdiction comports with traditional notions of fair play and substantial justice."); *Schlobohm v. Schapiro*, 784 S.W.2d 355, 358 (Tex. 1990) (identifying fair play and substantial justice as the third part of the "Texas formula").

inquiry" is a constitutional requirement); *Denmark v. Tzimas*, 871 F. Supp. 261, 269 (E.D. La. 1994), *aff'd*, 78 F.3d 582 (5th Cir. 1996) (dismissing claim for lack of personal jurisdiction where "although the defendant has the requisite minimum contacts * * * plaintiff's claim in this forum fails to satisfy the fundamental fairness requirements of due process").

Petitioner attempts to avoid this determinative element of the court of appeals opinion, suggesting in a footnote that "fair play" analysis necessarily depends on how the minimum contacts question is resolved, and that "fair play" is therefore not an independent basis for the court of appeals' ruling. Pet. 8-9 n.3. Petitioner's citation to *Asahi Metal Industries Company v. Superior Court of California*, 480 U.S. 102 (1987), in support of this contention is misplaced. In *Asahi*, while this Court was divided on the issue of minimum contacts, an eight-Justice majority held that the exercise of personal jurisdiction over the defendant would not comport with traditional conceptions of fair play and substantial justice, *"even apart from"* minimum contacts analysis, and reversed the lower court's finding of jurisdiction. *Asahi*, 480 U.S. at 113-16 (emphasis added). The *Asahi* Court did not regard settlement of the minimum contacts question as a threshold matter.[16]

Petitioner also cites the following dicta in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985): "[W]here a defendant who purposefully has directed his activities at

[16] As Mr. Justice Stevens put it: "An examination of minimum contacts is not always necessary * * * California's exercise of jurisdiction over Asahi in this case would be 'unreasonable and unfair.' *This finding alone requires reversal.*" *Id.* at 121 (Stevens, J., concurring in part and concurring in the judgment) (emphasis added).

forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Id.* at 477. But Petitioner ignores *Burger King*'s further admonition that "the concept of fair play and substantial justice may defeat the reasonableness of jurisdiction, *even if the defendant has purposefully engaged in forum activities.*" *Id.* at 477-78 (internal quotation marks omitted) (emphasis added). Fair play and substantial justice is thus an independent requirement that must be satisfied, and it is neither subsumed by nor contained in minimum contacts analysis.

B. The Factual Findings of The Court of Appeals, as well as The Record in This Case, Make Clear That Jurisdiction Over Alenia in Texas Would Offend Fair Play and Substantial Justice

In conducting the fairness inquiry, pursuant to *Guardian Royal Exchange Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 228 (Tex. 1991) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), the court of appeals made a series of findings. First, it recognized that "[a]llowing the suit to proceed in Texas would be expensive and burdensome for the Italian Companies," Pet. App. 27, and would "force them to defend against Reid's claims in a foreign legal system." *Id.*; *see Asahi*, 480 U.S. at 114 ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight."). Second, and "[m]ost significantly," the court of appeals held that "the interests of Texas in adjudicating this dispute are minimal." *Id.* ("Because this dispute does not involve any Texas entity

and cannot result in a judgment in favor of any Texas entity, we conclude that Texas's minimal interest in this dispute strongly militates against the assertion of jurisdiction in this case."). Third, the court of appeals observed this Court's admonition in *Asahi* that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." 480 U.S. at 115. Noting that Finmeccanica, S.p.A. is "an Italian company in which Italian government entities own a 34% interest," Pet. App. 28, the court of appeals properly recognized that exercising jurisdiction would "raise important concerns regarding the substantive policies of Italy and Russia and * * * the United States government's foreign-relations policies vis-à-vis these countries." *Id.* Finally, the court noted that enforcing any judgment from a Texas court will require that Reid "convince the appropriate decision-makers in the Italian judicial system that, under Italian law, he is entitled to enforce a valid Texas judgment." Pet. App. 28-29. Where the lower court's holding and the record itself disclose such a well-supported independent ground for the decision below, this Court should not grant certiorari.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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